



Department of Law Monthly Report

Department of Law
Office of the Attorney General
State of Alaska

August 2001
Issue Date – October 12, 2001

Bruce M. Botelho
Attorney General

Barbara J. Ritchie
Deputy Attorney General – Civil Division

Cynthia M. Cooper
Deputy Attorney General – Criminal Division

Collections & Support

ON-GOING COLLECTION ACTIVITIES

In August 2001, the Collections unit filed 13 complaints to reduce OSHA penalties to judgment and two motions for default. The unit requested that 13 new refunds be issued and distributed 45 refund checks to defendants, courts, and other agencies. The unit has entered its busy season. Defendants are now receiving notices from the Department of Revenue concerning the attachment of their dividends. As a result, the unit is receiving an increased number of telephone calls for information. In addition, the unit has released the permanent fund dividend attachments on 58 judgments that have been satisfied since the attachment was sent to the Department of Revenue.

NEW DATABASE COMPLETE

Database administrator Van Rauch completed the new Access database for tracking and collecting minor offense fines and their associated costs. This new database simplifies the process for entering, accessing, and reporting on these judgments. This new database will likely form the basis for a new database Mr. Rauch is currently creating to

In This Issue

COLLECTION & SUPPORT SECTION	1
COMMERCIAL SECTION	2
CONSUMER PROTECTION	2
ENVIRONMENTAL SECTION	3
FAIR BUSINESS PRACTICES	3
GOVERNMENTAL AFFAIRS	5
LEGISLATION/REGULATIONS	5
NATURAL RESOURCES	5
OIL, GAS, & MINING.	6
SPECIAL LITIGATION	6
TRANSPORTATION	7
CRIMINAL DIVISION	8
OSPA	12
PETITIONS & BRIEFS OF INTEREST	13
COURT DECISIONS OF NOTE – ALASKA	13

track, collect, and disburse victim restitution payments.

TEXAS CHILD SUPPORT ORDER CONFIRMED

In the *Schatz* case, AAG Richard Sullivan obtained a favorable ruling in an action to register a 1998 Texas child support order. The obligor objected to registration, arguing that the Texas court lacked personal jurisdiction because he was not given proper notice of the Texas action. He also claimed that the Texas order was obtained through fraud. After a seven-hour evidentiary hearing held over two days, the court confirmed the Texas order. The court determined that the obligor had received proper notice of the Texas action and that the evidence presented failed to demonstrate fraud. The court also found the obligor's testimony to be incredible.

FAVORABLE JUDGMENT RECEIVED IN KOVAC CASE

AAG Connie Carson obtained a judgment for child support arrears in the *Kovac* case, which was on remand from the Alaska Supreme Court. The supreme court had found that Mr. Kovac owed his biological child a duty of support back to the child's birth even though another man was named as the child's legal father. Ms. Carson attended several hearings and spent a considerable amount of time discussing the case with the custodial parent and trying to determine Mr. Kovac's true financial situation. At Ms. Carson's request, the superior court issued an ongoing child support order and a judgment for child support arrears in the amount of \$81,852.15 for the period of April 1985 through December 1999.

SUPREME COURT REJECTS PETITION FOR REVIEW IN RAGULA

The Alaska Supreme Court rejected a petition for review filed by AAG Diane Wendlandt in the *Ragula* case. Thus, the court refused to review a decision by Superior Court Judge John Reese, which held that an attorney has a vested ownership interest in his contingency fee upon signing the contingency fee

agreement. Judge Reese concluded that a child support lien, which was recorded long before the attorney perfected his attorney's lien but after the contingency fee agreement was signed, was inferior to the attorney's claim to the proceeds of the underlying tort litigation.

Commercial Section

AUGUST ACTIVITIES FOR THE ABC BOARD

AAG Linda Kesterson assisted Alcoholic Beverage Control Board staff in drafting four accusations against licensees for violations including gambling on premises, after-hours entertainment on premises, and improper written order sales into damp communities. She also worked with the staff to complete a regulation project that was filed by the Lt. Governor the end of July. The regulations include a new requirement that transfer applications filed after October 1 of the year in which a license expires must be accompanied by an application to renew the license; a new requirement concerning the collection of sales and use taxes for alcohol shipped into damp communities; and procedures for obtaining a package store license delivery permit for certain authorized purposes.

Consumer Protection

UNIT OBTAINS TRO

In a consumer protection action, AAG Cindy Drinkwater obtained a temporary restraining order to prevent Dennis Lee, d/b/a United Community Services of America (UCSA), from soliciting Alaskan consumers to purchase UCSA products, memberships, or dealerships. Mr. Lee was in Anchorage on August 30, 2001, as part of his "national tour" in which he has been marketing "revolutionary technologies," including a scheme by which consumers can

obtain "free electricity for life." USCA advertises that consumers will be able to install generators in their homes that will provide electricity for residential use and surplus electricity to sell back to utility companies. Mr. Lee fails to disclose to consumers that the technology for this plan does not currently exist.

Environmental

CELEBRITY CRUISES SETTLES JUNEAU AIR VIOLATIONS

Celebrity Cruise Lines agreed to pay the State of Alaska \$55,000 to settle claims of violations of the state's air emission standards during the 2000 cruise season. The settlement represented a civil assessment of \$27,500 for each of two incidents where the opacity of Celebrity's diesel exhaust exceeded state standards. Celebrity was the first to settle of seven cruise lines for which air violations were recorded in 2000. AAGs Craig Tillery, Chris Kennedy, Shannon O'Fallon, and Elise Hsieh have worked on these seven cases.

ENVIRONMENTAL SECTION RUNS INTERNET PESTICIDE STING

Environmental section intern Betsy Packard, posing as a pesticide buyer, uncovered illegal sales by five Internet pesticide sellers to the Alaska market. The violations involved sales of pesticides not registered in Alaska and, more seriously, sale of restricted-use pesticides to uncertified buyers. Two of the violators have agreed to pay civil fines and have changed their web sites to avoid future violations. Negotiations with two others are ongoing. The state filed a civil action against the most serious violator, W.B. McCloud & Co. of Illinois. AAG Chris Kennedy is overseeing this project.

Fair Business Practice

STATE SEEKS DISCIPLINARY ACTION OF NURSE AIDE

AAG Robert Auth, on behalf of the Division of Occupational Licensing, participated in a disciplinary hearing in Ninilchik involving William Major, a certified nurse aide. The division is seeking suspension or revocation of Mr. Major's certification based on fraud in his application for certification and conduct posing a significant risk to health and safety of patients. At hearing, the division introduced evidence that Mr. Major not only failed to report seven prior criminal convictions in his initial application for licensure, but that, over a five year period, he assaulted, abandoned, became intoxicated with, and had sexual relations with his female quadriplegic home health client. A decision by the hearing officer is expected in the next few months.

REGULATORY COMMISSION OF ALASKA ISSUES FAVORABLE RATE DECISION

The RCA issued its decision on the rate design component of the Matanuska Telephone Association (MTA) case, which was the subject of a hearing before the RCA in May. AAG Steve DeVries represented the Public Advocacy Section (PAS) at the hearing contending that MTA's request to use Universal Support (USF) to subsidize its business services should not be allowed, although the RCA has the discretion to allow it under existing federal law. In its decision, the RCA agreed in part with the PAS, and disallowed the use of USF to support some business services. The net effect of this decision will be a redistribution of these funds to lower the costs of other services MTA provides including residential services. MTA has requested reconsideration of the order. A decision is pending.

STATE ARGUES AGAINST ENSTAR-UNOCAL CONTRACT

AAG DeVries also represented the PAS in a five-day hearing before the RCA concerning a special contract that Enstar has developed with Unocal for exploration and delivery of natural gas from Cook Inlet. By way of background, Cook Inlet's natural gas supply is limited, and Enstar's existing contracts will begin to be insufficient to meet the demands of its customers as early as 2003. The contract proposed would give Unocal a right of first refusal to supply all of Enstar's natural gas needs in perpetuity, until such time as Unocal decides it no longer wants to supply Enstar gas. The contract provides for a new pricing mechanism based on the higher of a floor price of \$2.75 per million cubic feet, or a price based on an 3 year average of an index previously only used in the lower 48. Further, the contract would allow Unocal to sell Enstar existing gas at this new gas contract price, even if the gas sold was obtained at lower (or much lower) local prices. The companies justify the higher prices under the contract because of the high risk of the gas exploration program. Under the contract, Enstar is allowed to pass through to its rate payers all costs for this gas - its share holders bear no risk. Further, the contract provides no firm commitment for delivery beyond 2006, only a promise to expend \$11.5 million to explore for gas in Cook Inlet in "new" areas.

The PAS, through it AAG DeVries, argued adoption of this contract was not in the public interest for four reasons. First, the contract amounted to an exclusive dealing contract which, if adopted, would act as a disincentive to other producers, except for Unocal, to explore for gas in Cook Inlet. Second, the pricing was unjustified as the risks identified were not as substantial as claimed, and costs expended for exploration were easily recovered. Third, Unocal would be able to arbitrage existing gas supplies at this new higher gas contract price, which could include North Slope gas if a line was developed. And finally, Enstar's ability to pass all costs through

to its ratepayers was in essence a mechanism requiring its captive ratepayers to subsidize a risky exploration program. The PAS argued such risks should be borne by Enstar's shareholders, not its ratepayers. A decision is pending.

LOCAL TELEPHONE COMPETITION ISSUE MOVES TO NINTH CIRCUIT

AAG DeVries is representing the RCA in an appeal before the Ninth Circuit Court of Appeals challenging the federal court's jurisdiction over the RCA and to review a decision by the RCA. This case originated in federal district court from a claim by ACS that the RCA had improperly interpreted the provisions of the federal Telecommunications Act of 1996 in requiring it to open its monopoly to competition in Fairbanks and Juneau. The RCA first decided that competition should be allowed in these cities, and then determined the rates that GCI was required to pay ACS for the use of its facilities in providing competitive services.

ACS filed a complaint in federal court challenging the RCA's decision. The RCA, represented by AAG DeVries, filed a motion to dismiss claiming the action against it was barred by the 11th Amendment, and that no action could proceed, even against GCI as it was an indispensable party to any judicial review of its decisions. Judge Holland denied the RCA's 11th Amendment immunity motion, finding the state had constructively waived its immunity by participating in its administrative activities. However, Judge Holland did stay the entire case pending appeal finding the RCA a necessary party.

The RCA has appealed the immunity ruling to the Ninth Circuit. ACS has appealed the district court's decision to stay the entire case. Briefing is complete. Argument is scheduled for November 8, 2001, in Seattle on both appeals.

Governmental Affairs

DISMISSAL GRANTED IN RACE DISCRIMINATION CASE

United States District Court Judge James Singleton has dismissed a former CSED employee's race-discrimination claims against 17 individuals whom the former employee named as defendants. Judge Singleton agreed with AAG Dave Jones' argument that Title VII of the Civil Rights Act of 1964 does not authorize employment-discrimination claims against individual supervisors or co-workers.

FY 1996 THROUGH FY 2001 MEDICAID RATES FOR BARTLETT REGIONAL HOSPITAL SETTLED

Stipulations for dismissal in six Medicaid rate administrative appeals were filed in August 2001, based on the negotiated settlement agreement with Bartlett Regional Hospital. Alaska Regional Hospital participated in informal resolution of all but six issues in its FY 1995 Medicaid rate appeal, prior to evidentiary hearing in August. AAG Julia Tucker handled these appeals.

Legislation/Regulations

REGULATION REVIEWS MEET DEADLINES

During the month of August 2001, the Legislation and Regulations section performed several urgent reviews of regulations projects in order to meet federal program or other deadlines.

Because the federal fiscal year starts October 1, several regulations projects were processed for filing by September 1 so that they would be in effect before the October 1 deadline. These regulation projects include Medicaid payments for disproportionate share hospitals and revisions to the state's temporary assistance and adult public assistance programs.

The section also processed important regulations on personal care attendants, administrative appeals to the Department of Natural Resources, auto emissions in the Fairbanks area, treatment of drinking water, assisted living homes, heirloom marriage certificates, fish and game, and a variety of occupational licensing matters.

The section also compiled proposals for legislation for the governor's consideration for the next legislative session.

Natural Resources

NEIGHBORHOOD MINE WATCH V. STATE, DNR APPEAL STAYS ON SCHEDULE

The court agreed with the state and issued an order in *Neighborhood Mine Watch v. State, DNR* (an appeal of the haul road right-of-way for the True North mining project North of Fairbanks) denying the appellant's motions to supplement the points on appeal and to stay the briefing schedule. The appellant had moved to supplement the points on appeal (to add an appeal of DNR's approval of a temporary amendment to the mine's plan of operations) on the very day that the appellant's opening brief was due (after extension). It was the state's argument that a grant of the motion would require supplementation of the record with other DNR case files and post decisional documents. Therefore, this motion to supplement the points on appeal was an end run around the court's earlier denial of a motion to supplement the record. The appellant's brief is now due on September 21.

NEW ENVIRONMENTAL REGULATION PACKAGES IN THE WORKS

The Natural Resources section assisted the Department of Environmental Conservation in getting the interim enhanced surface water treatment rule and disinfection/disinfection by-

products rule regulations filed. Domestic/nondomestic wastewater fee regulation packages, as well as several drinking water regulation projects that are still at the agency level are closely following up this regulation package.

EFFORT TO HALT BISON HUNT FAILS

AHTNA Corporation, Kluti Kaah Village Corporation, and the Copper River Native Association sued the state in an attempt to halt a bison hunt occurring along the Copper and Chitna rivers. Plaintiffs claimed that the state's authorization of the bison hunt resulted in trespass on native corporation lands because most of the available habitat was on those lands. The state, represented by AAG Kevin Saxby, moved to dismiss the complaint on the grounds that it failed to state a cause of action upon which relief could be granted, because the decision to hold or not hold a hunting season is, on its face, an immune decision and because there were no allegations whatsoever to the effect that the state had actually engaged in, or caused, trespass. Palmer Superior Court Judge Cutler converted the motion to dismiss to a motion for summary judgment, and granted the state summary judgment, dismissing all claims.

CFEC DECISION UPHELD IN LIMITED ENTRY PERMIT CASE

Superior Court Judge Larry Weeks recently upheld a Commercial Fisheries Entry Commission (CFEC) decision denying Donald Holgate limited entry permits for the southeastern Tanner and red and blue king crab fisheries. Mr. Holgate claimed the death of his son and health problems prevented him from fishing during some of the qualifying years and claimed points under the extraordinary circumstances provision of the CFEC regulations. CFEC found that that facts did not support a finding that extraordinary circumstances prevented him from fishing. The court held CFEC's decision was supported by substantial evidence and that CFEC reasonably interpreted the extraordinary

circumstances regulation in denying Mr. Holgate the permits. Mr. Holgate will not appeal the decision. AAG Shannon O'Fallon handled the appeal.

Oil, Gas, & Mining

On August 15 and 16, BP Exploration held an Oil and Gas Industry Seminar, which consisted of one day of presentations by BP in Anchorage and a tour of the North Slope on the second day. AAGs Virginia Ragle and Lisa Kirsch attended. The presentations on the first day covered basic mineral rights, oil and gas leases, unitization, petroleum geology, reservoir management, drilling, process facilities, and an overview of the Trans-Alaska Pipeline System. The tour on the second day included a visit to a wellhead, Alyeska Pump Station #1, the central gas facility, a drilling rig, the grind and inject facility, and a brief stop at the Beaufort Sea. The tour prompted a new understanding of terms and processes that are often referenced in documents, but rarely experienced in person.

Special Litigation

WRONGFUL DEATH SUIT AGAINST THE DIVISION OF WORKERS' COMPENSATION DISMISSED

Superior Court Judge Rindner has dismissed a novel wrongful death suit filed against the Division of Workers' Compensation. The plaintiffs are the children of a woman who was murdered while she was allegedly an employee of a bar in the Soldotna area. The bar owners did not carry workers' compensation insurance. The plaintiffs argued that the division knew that the bar was uninsured and negligently failed to take any action to issue a stop work order or otherwise force the bar owners to comply with the law. Judge Rindner granted the state's

motion for summary judgment, filed by AAG Rick Keck, and held that the division does not owe employees a duty to take action against employers who do not carry workers' compensation insurance. The workers' compensation statutes provide employees with specific and exclusive remedies that preclude separate tort claims against the state.

FAVORABLE DECISIONS ON DRUG ADDICTION CLAIM OVERTURNED

The Alaska Supreme Court overturned the Alaska Workers' Compensation Board and the superior court decisions that a claim for workers' compensation for drug addiction was barred by AS 23.30.120(a)(3). That section provides that injuries proximately caused by being under the influence of misused prescription drugs are not covered. However, the supreme court pointed out that willfully taking of drugs not as prescribed could be a supervening factor barring compensation for disability and the board was directed to enter findings on that issue. Full attorney fees were awarded on appeal but were reduced to a "reasonable" rate.

CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS DENIED

The Alaska Workers' Compensation Board denied a claim for permanent total disability benefits after a hearing in Juneau. The claimant, a Certified Nurse Assistant, initially received temporary disability benefits for a right shoulder injury due to a 1997-lifting incident at one of the Pioneer Homes. Medical disputes then arose between some of her treating physicians, and the state's medical experts, over the permanency of the shoulder injury and an alleged disabling psychological condition attributed to the stress of the injury.

As provided by the Alaska Workers' Compensation Act, the board retained two independent medical experts (an orthopedic surgeon and a psychiatrist) to assess the employee's condition and the disputed medical opinions. The board's orthopedic expert

concluded the employee's current complaints were unrelated to the 1997 injury. The board's psychiatric expert also concluded the employee's shoulder injury had neither caused nor aggravated any disabling psychological condition.

The Department of Administration argued at hearing that the board and department medical experts' opinions combined to outweigh the contrary opinions of the employee's physicians. As the board must base its findings on the preponderance of the relevant evidence, the claim for permanent disability benefits should be denied and dismissed. The board agreed, denying the claim based upon its finding by a preponderance of the evidence that the employee's 1997 injury had caused no permanent disability.

This case was a team effort by the workers' compensation attorneys in Anchorage Special Litigation. AAG PAUL Lisankie handled briefing in the case; when AAG Lisankie was unavailable for the hearing, AAG Knudsen stepped in for AAG Lisankie. Now that's teamwork!

Transportation

JUDGE CONFIRMS STATE POSSESSION AND TITLE IN PARKS HIGHWAY CONDEMNATION CASE

Superior Court Judge Gonzalez issued a long awaited order in an eminent domain case, *State v. Fairview Parks*, denying the defendants' motion to dismiss for want of authority and necessity, and granting the state's motion to confirm possession and title. The essence of the defendants' motion was that the state improperly planned to upgrade the Parks Highway east of Wasilla as a controlled access facility. The defendants contended that the state should have addressed congestion on the Parks Highway by building a bypass around Wasilla and upgrading the existing highway to a

five-lane uncontrolled access facility. Judge Gonzalez held that the defendants did not meet their burden to show that the state had acted arbitrarily or capriciously.

KIEWIT PACIFIC BID PROTEST RESOLVED

The state solicitation for construction of roadways at Ted Stevens Anchorage International Airport included terms requiring that a proposed landscape subcontractor meet certain experience criteria, including having done business under the same business license for three years. Landscape subcontractor information was not considered in bid evaluation, but was to be provided by the low bidder along with its list of subcontractors. The low bidder was a recently reorganized highway construction company. As part of its reorganization, it established a new, wholly owned, landscaping company. The low bidder named its new subsidiary as the landscaping subcontractor for the work. The second low bidder protested, claiming that the contract should not be awarded to the low bidder because its landscaping subcontractor did not meet the specifications. After a hearing, hearing officer David Ruskin wrote a decision recommending that the protest be denied because the question of landscape subcontractor specifications was a matter of contract administration, and not bid evaluation. The Commissioner of the Department of Transportation & Public Facilities decided to reject the hearing officer recommendation, but denied the protest. The protestor did not appeal.

Criminal Division

ANCHORAGE

Carl Mercurief was indicted by grand jury for murder in the first degree, two counts of murder in the second degree, two counts of burglary in the first degree, two counts of

assault in the third degree, and misconduct involving a weapon in the third degree. He has been accused of shooting to death a U.S. Coast Guard officer on St Paul Island. Mercurief believed that his estranged wife was having an affair with the officer. He went to the Coast Guard facility and beat the officer before shooting him several times. Mercurief then went to his wife's house, confronted her, and assaulted her.

Robert Sherman was sentenced to 360 days with 210 days suspended for assault in the fourth degree and to 360 days with 180 days suspended for DWI. James Pehrson was sentenced to six years with four years suspended for assault in the second degree and 360 days with 270 days suspended for DWI. Pehrson was driving the wrong way on the Glenn Highway when he collided with Sherman. Sherman took no action to avoid the collision. Both men had prior DWI convictions. Two passengers in Sherman's vehicle were thrown into the windshield, but not seriously injured. Sherman's BAC was 0.194 percent and Pehrson's BAC was 0.13 percent.

Curtis Pavila was charged with three counts of sexual assault in the first degree for raping an Anchorage woman. Pavila picked up the woman and drove to an alley. He then punched her in the face and sexually assaulted her. The assault stopped when the victim's screams attracted the attention of security guards. Police arrested Pavila at his house and found the woman's glasses in his vehicle. He is a previously convicted sex offender.

William Grossman and Erick David were charged with murder in the second degree for the beating death of an Anchorage man. The victim had attempted to intervene in an argument about a bottle of alcohol. David helped Grossman beat the victim.

Susan Osborne pled no contest to assault in the second degree for shooting her friend. Osborne had been drinking for several days and stopped taking her medication for mood

swings. For unknown reasons, Osborne started shooting after entering her friend's home. Her friend fled to her bedroom and got shot in the hand. Police were held off for five hours before Osborne emerged from the house, pointing the handgun at the responding officers. Two officers shot Osborne in the shoulder.

Lamar Gathers was charged with murder in the first degree for using a hatchet to kill a 19-year-old man. Gathers is also charged with burglary in the first degree, tampering with evidence, and assault in the first degree. The man was sleeping with his girlfriend, when Gathers came in the back of the house and killed the man. Gathers also struck the girlfriend in the head, leg and twice on the arm with the hatchet. She managed to escape and run to her neighbor, an Anchorage police officer.

Charles Wiseman was sentenced to a composite sentence of 18 months with 12 months suspended for the three counts of assault in the fourth degree. He was also ordered to perform 300 hours of community work service and must pay \$6,000 in fines over a period of three years probation. Wiseman was convicted as an accomplice in the "paintball assaults" for video taping the events on January 14, 2001.

BARROW

The grand jury refused to indict in two marijuana cases. In one, the defendant admitted she gave marijuana to her minor son, but said she was trying to get him to cut down on this weekly amount. In the other, the defendant was caught with a large shipment, and admitted he had been selling marijuana in Barrow for some time, but was very, very sorry.

The grand jury did indict several defendants for sexual assault, assault, interference with official proceedings, and felony DWI.

Defendants set for trial pled out in sexual abuse, felony DWI, and bootlegging cases. The one felony trial of a defendant for a retaliatory assault with a weapon resulted in an acquittal.

A murder defendant whose confessions were suppressed was sentenced to ten years for criminally negligent homicide after a two-day sentencing proceeding.

BETHEL

Devinder Brar transferred from Fairbanks. Ms. Brar clerked for Judge Curda the prior year and it is good to have her back in Bethel.

Michael Nicolai was convicted of sexual assault in the first degree, sexual assault in the second degree (alternative charge), assault in the fourth degree, and misdemeanor importation of alcohol following a jury trial. He faces a presumptive sentence of 25 years for the sexual assault in the first degree. Eric Sirilo was found not guilty of misconduct involving a controlled substance in the fourth degree after a jury trial.

The grand jury indicted several individuals for sexual assault and sexual abuse of a minor. Other defendants were charged with burglary, assault, arson, and weapons misconduct and attempted murder.

FAIRBANKS

William Peter was indicted for first-degree murder for shooting his best friend with a rifle in Kaltag. Peter was intoxicated and shot the victim who was sitting at the dining room table because the victim didn't immediately leave Peter's residence when requested.

James Stewart earned the dubious distinction of being the first to be charged with felony DWI under the new 0.08 percent law. Stewart was arrested at 12:40 a.m., on September 1, 2001, with a BAC of 0.083 percent. The law went into effect at midnight.

Judge Savell sentenced Leonard Roach to 25 years for committing a number of random drive by shootings. Fortunately, Roach was a bad shot and no one was killed.

Judge Wood sentenced Richard Cook, a Baptist minister who molested a number of foster children in Ruby, to 15 years. Cook, a Canadian citizen, fled to Canada and was returned to Alaska after a prolonged international extradition.

Dana Merriman joined the Fairbanks office as an ADA and Tom Temple, recently hired as an Anchorage ADA, filled in for ADA Frank Spaulding who received a non-work-related broken jaw.

JUNEAU

There was a major increase in the number of felonies for the month. The grand jury spent two additional days in session to clear the backlog. Nine drug cases, four sexual assaults, three sexual abuse of a minor cases, three felony DWI's, five assaults, five burglaries, one robbery, five thefts, and assorted other misbehavior were indicted by the grand jury.

KENAI

Exactly 13 months to the day after he and his co-defendant raped a 13-year-old girl on the hood of a car, David Anderson was convicted of sexual assault in the first degree. The jury took less than two hours to convict. The jury rejected the defendant's claim that he did not penetrate the victim because he did not have an erection. Defense expert Dr. Joyce Adams' testimony supported the state's case when, under cross-examination, she admitted that penetration could have still occurred.

The grand jury indicted 24 people on charges that include theft in the second degree, misconduct involving controlled substance, assault in the second and third degrees, criminal mischief in the first degree, driving

while intoxicated, sexual abuse of a minor in the second degree, vehicle theft, weapons misconduct, forgery in the second degree, and sexual assault in the second degree.

KETCHIKAN

Marvin Charles' jury trial in Ketchikan for furnishing alcohol to minors ended in a hung jury. Isaac Guthrie's jury trial in Craig for furnishing liquor to minors ended in an acquittal. As occurs frequently in these cases, the minors changed their story at trial and testified that the defendant did not furnish the alcohol to them, even though they had told the police that the defendant had. John McGraw's jury trial in Craig for assaulting a VPSO ended in an acquittal. A fish and game court trial for too many lines in the water ended in a guilty verdict.

The grand jury returned a number of indictments. Joseph Paul, who had escaped from a minimum prison facility in Oregon where he was serving a sentence for robbery, was indicted for robbing a drug store. He pointed a gun at the pharmacist and demanded some drugs. A few days later his roommate told the police that Paul had committed the robbery. The police found the empty drug bottle in Paul's hotel room. Paul was indicted for robbery in the first degree. The roommate, who said that Paul had told him about the robbery and asked him to get rid of Paul's clothing worn during the robbery, was indicted for tampering with physical evidence for throwing away the clothes.

Angelito Santos was indicted for arson in the first degree for locking himself in his room, pouring diesel fuel around, and setting it on fire. He was despondent over breaking up with a friend and claimed that he started the fire to get help.

Five different persons were indicted for theft in the second degree. One was a woman who stole her ex-boyfriend's checkbook and wrote 40 forged checks. Three others were indicted

for misconduct involving a controlled substance in the fourth degree.

KODIAK

A Kodiak man was convicted of assault in the third degree and driving while intoxicated following a vehicular accident in which his four passengers suffered some bumps and bruises. A blood test following the accident revealed that the defendant's blood-alcohol level was 0.179 percent. All passengers were initially taken to the hospital where they were treated and released. This defendant was sentenced to 24 months with 21 months suspended for the assault in the third degree and 210 days with 180 days suspended on the DWI, with the sentences running consecutively. He was additionally placed on probation for five years during which time he cannot consume any alcohol and must undergo an alcohol abuse evaluation and complete any treatment as shall be recommended by that evaluation including up to six months residential treatment.

KOTZEBUE

The retrial of Stephen Cleveland, the first-degree sexual assault trial that took up much of June, is currently underway with Nome District Attorney John Vacek prosecuting. The shut-down of the airport has delayed the trial due to witness unavailability.

Mahlon Uhl, Jr., was indicted for misconduct involving a controlled substance – cocaine possession. He was also charged with violation of release conditions. Uhl was on release on a prior drug offense. Trial in both cases is scheduled for October.

Ros Lockwood left the Kotzebue office as of August 24 and has taken up residence in the Anchorage District Attorney's Office. Windy East transferred from Anchorage to Kotzebue on August 22.

Kotzebue is also expecting to lose Magistrate Sherry Clark at the end of September and no one has yet been named to take her place. However, Rob Lockward, the law clerk and deputy magistrate for the Second Judicial District, is stationed in Kotzebue this year and will help out with the overflow.

NOME

It was quite a month for ADA John Earthman. In his first felony trial, he got convictions for the offenses of coercion and fourth degree assault against defendant William Otten. The coercion offense involved Otten restraining the victim in a residence for several days so that her injuries would not be seen. The victim escaped, however, and ran to a neighbor's house to report the offense to the St. Michael VPSO. Otten has two previous felony convictions as well as eight previous assault convictions (many of them on the same victim).

Several interesting new cases found their way into the system. Maria Omiak, of Teller, was arrested and later indicted for assault in the first degree after stabbing her husband several times with a filet knife. In her statement to the troopers, she said that she had told her husband she would kill him if she caught him messing around with another woman. Vincent Eakon has been charged with a sexual assault occurring in Unalakleet. Robert Apok was charged with a felony assault after he bit a chunk out of the face of a drinking companion in an apparently unprovoked assault. Melton Sutherland was indicted on a felony DWI charge and pled out at arraignment.

PALMER

Marc St. Jeor pled to a reduced count of sexual abuse of a minor in the fourth degree. He was sentenced to the maximum jail sentence. St. Jeor was originally charged with four counts of sexual abuse of a minor in the first degree. The victim fled to Oregon. Despite an Oregon judge's order to return to Alaska for trial and a

material witness warrant, she could not be located.

Eighteen-year-old Norman McDaniels received 12 years to serve for his plea to a consolidated count of sexual abuse of a minor in the first degree. The count included seven children, all six-years-old or younger. McDaniels was the adopted uncle to all the victims. He began abusing them soon after he was placed in his foster family's home. The abuse ceased when the oldest child disclosed the abuse. McDaniels confessed to some of the actions, and admitted that he chose some of his victims because they were too young to speak.

Former Colony High School teacher Rhonda Gildersleeve was sentenced after a plea to sexual abuse of a minor in the fourth degree. The state charged Gildersleeve after she voluntarily went to the Alaska State Troopers and admitted to her encounter with a student. She was sentenced to one year with six months suspended and fined \$5,000, which may be offset by restitution to the victim. She was also placed on supervised probation for the first year of her probationary term.

A Trapper Creek man will be serving 130 days in jail for shooting and wasting a cow moose last year. After a three-day trial, a Palmer jury took a little over an hour to convict Conrad Pieske of illegally taking a cow moose, wanton waste, illegal transportation and possession and attempted tampering with evidence. Evidence proved that during December 1999, Pieske shot a cow moose, cut off the animal's head to conceal its sex, dragged it home, and then let the 450 pound carcass rot in his yard until Fish and Wildlife officers learned of the situation in May 2000. Pieske was an experienced bear hunter. A relative had told FWP that Pieske intended to use the rotten animal as bear bait. Pieske himself told FWP he had friends coming from Arkansas for a spring bear hunt. Pieske had shot a sublegal bull a year earlier. Judge Lombardi sentenced Pieske to a composite 800 days in jail with all but 130 days suspended, fines and restitution

totaling \$3,500.00, forfeiture of a 30:06 rifle and scope - which he vigorously protested - and loss of hunting and trapping license for five years. The judge conditioned the 10-year probationary period on Pieske not going in the field with anyone who is hunting or trapping.

OSPA

(Office of Special Prosecutions & Appeals)

Personnel News

Tiffany Thomas returned to OSPA as the special prosecutions secretary.

Prosecution News

Ex-doctor gets 20 years in jail. Ex-doctor Stephen Grandstaff was sentenced to 34 years with 14 suspended (20 years to serve). In May, Grandstaff was convicted by a jury of 73 felony counts, including one unclassified felony, 32 A felonies, one B felony, and 39 class C felonies. The conduct underlying the charges involved sexual assault and abuse of female patients, stealing money from the Alaska Medicaid Fund by submitting false billings for patient services, and issuing dozens of prescriptions without a legitimate medical necessity.

Child-support offender pays arrearages in full. Richard Childers was found to be in violation of a probation condition requiring him to make monthly payments on his child support arrearages and was ordered either to pay his arrearages in full or remand himself on August 7 for ten days in jail. Childers remanded himself on August 7th. That afternoon, the Child Support Enforcement Division received a check from Childers for the total amount of the arrearages, \$30,223.09. After some motion work from the defense, Childers was released from jail the next day.

Civil Litigation News

Sex offender registration update. The Ninth Circuit Court of Appeals denied the state's petition for rehearing *en banc* of its decision in *Doe v. Otte*, No. 99-35845. In *Doe v. Otte*, the Ninth Circuit held that Alaska's sex offender registration statute is "punitive," rather than remedial, and therefore violates the *ex post facto* clause as applied to sex offenders who committed their sex offenses prior to the statute's effective date. Meanwhile, Fairbanks Superior Court Judge Richard Savell rejected a similar argument by a sex offender in a Fairbanks civil case, *Doe v. State*. Judge Savell declined to follow the Ninth Circuit's decision. He explained that state courts are not bound by the Ninth Circuit's decision and that the Ninth Circuit's reasoning is not persuasive.

Petitions of Interest

Minor consuming – right to jury trial. The state argues that a defendant charged as a first offender with "minor consuming alcohol" is not entitled to a jury trial or appointed counsel. In his order granting defendant Candice Auliye a jury trial, Nome Superior Court Judge Ben Esch said, among other things, that the possibility that Auliye would be required to participate in in-patient treatment as a condition of probation was sufficient to trigger a right to a jury trial. In its petition for review, the state points out that the defendant always has the option of violating his or her probation conditions and acquiescing in the imposition of a fine. Since the ultimate sanction is a fine, the defendant doesn't have a right to a jury trial. *State v. Auliye*, No. A-8084.

Briefs of Interest

Local option – boundaries of local option area. The state urges the court of appeals to reinstate the prosecution of a defendant who was caught within the St. Mary's local option area with a boat full of liquor. The police found the boat on the shore of the Andreafski River

within the St. Mary's municipal boundaries. But Judge Curda dismissed the prosecution after finding that the river itself is owned by the state, not the municipality. In its brief, the state explains that ownership interests are different from political boundaries, and that even land owned by the state can fall within the boundaries of a municipality. *State v. Prince*, No. A-7681.

Nygren credit – modification of bail conditions. The state argues, in an interlocutory petition for review, that judges should not grant bail-modification requests designed exclusively to make the defendant eligible for *Nygren* credit. In this case, the defendant was released on his own recognizance pending his trial for drunk driving. One month later, he asked the judge to "order" him into a private rehabilitation program in Washington state. The judge complied with this request, over the prosecutor's vigorous objection. *State v. Judson*, No. A-8050.

Court Decisions of Note - Alaska

Independent blood test – advice by police officer. When a police officer answers questions posed by a drunk-driving arrestee about the independent blood test, and the effect of the police officer's answers is to dissuade the arrestee from obtaining the blood test, the arrestee's breath-test result is subject to suppression, even if the information provided by the police officer was accurate, and even if the officer's only motive was to help the person arrested. *MacLeod v. State*, Op. No. 1759 (Alaska Court of Appeals, 8/17/01).

Sentencing – felony refusal to submit to a breath test. Only the mandatory-minimum portion of a defendant's sentence for felony refusal to submit to a breath test, as defined in AS 28.35.032(p), must be made consecutive to any sentence for another offense. The portion of his sentence that exceeds the mandatory minimum may be made concurrent with his sentence for another offense. *Baker v. State*, Op. No. 1761 (Alaska Court of Appeals, 8/24/01).

Theft by receiving – not a continuing offense. Theft by receiving is not a continuing offense. Rather, theft by receiving is committed at the instant when the defendant, having received stolen property, becomes aware of a substantial and unjustifiable risk that the property is stolen. *Saathoff v. State*, Op. No. 5453 (Alaska Supreme Court, 8/17/01).

Mandatory parole – calculation of good-time credit. Good-time credit for partially consecutive sentences is calculated the same way it is for purely consecutive sentences, *i.e.*, the composite sentence length is multiplied by one-third. In other words, a defendant who is sentenced to two or more partly concurrent terms of imprisonment is not entitled to earn good-time credit on both sentences simultaneously while serving the concurrent portion of the sentences. *Jackson v. State*, Op. No. 1762 (Alaska Court of Appeals, 8/31/01).